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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 285

THE FEDERAL BROADCASTING SYSTEM, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

No. 532

STAR TELEVISION, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 31a–50a)[1] is not yet reported. The decision and memoran-

[1] Unless otherwise noted, "Pet. App." references are to the appendix to the petition in No. 285, which is paginated identically with the appendix to the petition in No. 532, except for an additional statutory appendix.

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dum opinion and order of the Federal Communications Commission (Pet. App. 1a–30a) are reported at 9 F.C.C. 2d 249 and 10 F.C.C. 2d 718.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1969 (Pet. App. 50a). Timely petitions for rehearing were denied on April 1, 1969 (Pet. App. 51a). The petition for a writ of certiorari in No. 285 was filed on June 26, 1969. The time for filing a petition for a writ of certiorari in No. 532 was successively extended by the Chief Justice and Mr. Justice Marshall to and including August 29, 1969, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 28 U.S.C. (Supp. IV) 2350.

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission properly applied its comparative criteria to the ten remaining applicants for a television station license in Rochester, New York.

2. Whether the Commission abused its discretion by declining to consider the post-record attempt of one of the applicants to better its relative position by offering to dispose of its Rochester radio station.

STATUTE INVOLVED

Pertinent provisions of the Communications Act of 1934 are set forth in Appendix E of the petition in No. 285 (pp. 52a–53a) and in the petition in No. 532 (pp. 3–4).

STATEMENT

In 1961 twelve applicants, including all of the petitioners in No. 532 and the petitioner in No. 285 along with the intervenor below, Flower City Television Corporation, submitted applications to the Federal Communications Commission for construction permits to operate a third VHF television station in Rochester, New York, on Channel 13. The applications, being mutually exclusive, were designated for a comparative hearing to determine which applicant would better serve the public interest.[2] See *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327.

After a lengthy evidentiary hearing the examiner issued an initial decision awarding the permit to a commercial operator and an educational association which had jointly proposed to operate Channel 13 on a share-time basis. However, after the filing of exceptions and supporting briefs and oral argument before the Commission, the joint applicants withdrew their applications.[3] In May 1965 the Commission remanded the case to an examiner for further hearing.

[2] Since September 15, 1962, all of the petitioners have combined to provide service over Channel 13 through a Commission-authorized interim corporation. This interim corporation continues to operate on Channel 13 as a result of the court of appeals' February 19, 1968, stay of the Commission's decision, which was continued in effect pending disposition of the instant petitions.

[3] The educational association then applied for authorization to operate, and is currently operating, a full-time UHF educational station in Rochester.

On July 28, 1965, before the contemplated further hearing was held, the Commission issued its *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393, in which it set forth the factors and criteria which were to govern the selection of applicants in all future comparative station license proceedings.[4] In the light of this action, the Commission determined that the present case could be decided upon the existing record without the taking of further evidence by an examiner. None of the parties objected to the Commission's decision not to hold a further hearing. Additional oral argument was had before the Commission, after which it rendered the decision under review. It adopted the examiner's findings, made further findings, formed its own conclusions in light of the comparative criteria explored at the hearing, assessed the applicability and weight of each of the criteria as set out in its *Policy Statement,* and awarded the grant to Flower City.

The principal bases for the Commission's decision were the assurance of good performance that Flower City offers because of the extensive broadcast experience of two of its stockholders who are going to par-

[4] The general objectives of the Commission are to select as a licensee the applicant who will provide the best practicable service to the public and at the same time offer a maximum diffusion of control of the media of mass communications (1 F.C.C. 2d 394). These goals are measured against those factors traditionally applied in determining the grant of a station license to competing applicants, *viz*: (1) diversification of control of the media of mass communications, (2) extent of participation in station operation by owners, (3) proposed program service, (4) past broadcast record, (5) efficient use of the frequency and (6) character. The *Policy Statement* sets forth the manner in which each of the above factors will be evaluated.

ticipate in the full-time operation of the station, and the fact that the great majority of Flower City's stock is held by local residents, the majority of whom will devote some time to the operation of the station (Pet. App. 1a, 9 F.C.C. 2d 249; reconsideration denied, 10 F.C.C. 2d 718, Pet. App. 24a).

In assessing the ten remaining applicants, the Commission found that, aside from Flower City, only Community (one of the petitioners in No. 532) and Federal (the petitioner in No. 285) had significant characteristics warranting a preference on any score.[5] It preferred Flower City over Federal, however, because Federal's single stockholder was already connected with a radio station in Rochester and therefore Flower City would provide an entirely new viewpoint in the community (Pet. App. 13a). While the Commission found the past broadcast record of those associated with Community commendable, it also found this factor to be of reduced significance because it was attributable to one individual who was only a 15-percent stockholder in Community (Pet. App. 14a). It found that on balance this plus for Community did not warrant preferring Community over Flower City because of the latter's superiority on two other counts—broadcast experience and participation in the operation of the proposed station by its owners (Pet.

[5] The Commission found that Federal warranted a preference because it provided total integration of ownership and management (Pet. App. 9a), and that Community was entitled to a preference because of its 15-percent stockholder's relationship to the "commendable record of performance" compiled by station WHAM, with which he had previously been associated (Pet. App. 11a–12a).

App. 13a–14a).[6] Two commissioners dissented (Pet. App. 19a, 21a).

On appeal to the court below, petitioners charged the Commission with various errors, including failure to adhere to the guidelines of its *Policy Statement,* to give adequate reasons for its decision, and to consider Federal's post-record offer to sell its Rochester radio station.

The court of appeals tested the Commission's procedures and conclusion against the guidelines laid down in *Johnston Broadcasting Co.* v. *Federal Communications Commission,* 175 F. 2d 351 (C.A.D.C.). A majority of the court found the Commission's reasoning to be "clear and amply supported by findings of fact and by the evidence" (Pet. App. 34a). Judge Leventhal dissented, stating that in his view the Commission's findings failed to support its order and that it failed to set forth its reasons for preferring Flower to Community (Pet. App. 37a).

ARGUMENT

The selection on rational grounds of one seemingly qualified applicant over another in any particular comparative licensing proceeding is obviously a matter over which reasonable administrators and judges can differ. To minimize such differences the Commission has adopted for all future cases its *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393. Here it applied the policies there enunciated

[6] See also Pet. App. 25a–26a, where the Commission, in denying reconsideration, summarized the bases on which its selection of Flower City over Federal and Community had been grounded.

to the extensive and detailed findings of fact made by the examiner and independently determined to select Flower City instead of one of the other applicants to operate the new Rochester television channel. Petitioners raise no question as to the general validity of the criteria contained in the *Policy Statement*. Rather, their principal contentions (Pet. No. 532, pp. 12–22; Pet. No. 285, p. 23) are that in so choosing the Commission failed to provide the applicants and the reviewing court with sufficient findings and an adequate explanation of its reasons for preferring Flower City. The careful review of the court below demonstrates that the findings and explanations were adequate, that the guidelines were followed, and that the dispute presented by this record raises no general issue warranting review by this Court.

1. As both the majority and the dissenter pointed out in the court below, the Commission need not, as petitioners had suggested, "reach and state a comparison between each pair of applicants in respect to each criterion" expressed in its *Policy Statement* (Pet. App. 35a, 41a–42a). Instead its duty is to make "findings in respect to each applicant as to every point of comparison suggested by a party and then a composite consideration" (Pet. App. 35a). This accords with long-established precedent governing findings in comparative licensing proceedings. *Johnston Broadcasting Co.* v. *Federal Communications Commission, supra.*

In the instant case, the Commission's decision reflects a concise evaluation of the comparative criteria set forth in the *Policy Statement* in the light of the

examiner's 253 pages of findings of fact. Although in the court of appeals' words "[t]he case was enormously complicated and tedious" (Pet. App. 33a), it found that the Commission's findings and conclusions clearly indicated the reasons for its preference of Flower City over the other applicants. The Commission considered, and the court discussed, each pertinent factor, including broadcast experience, diversification of control of mass communication media, and owner participation in station management. The Commission could find no preference with respect to proposed program service,[7] but was able to make an assessment of past broadcast service and to determine among the three surviving applicants—Flower City, Federal and Community—a preference for Flower City over Community because of its superiority in participation in station operation, and a preference of Flower City over Federal because of the latter's existing Rochester station. These conclusions were, of course, supported by the examiner's detailed basic findings.

Both the Commission's decision and the court of appeals' review follow the guidelines set forth in this Court's rulings. *Federal Communications Commission*

[7] Petitioners' assertion that the Commission failed to consider the proposed programming of the applicants is contrary to fact; over 120 pages of findings (9 F.C.C. 2d 354, *et seq.*) were adopted by the Commission. Based on these findings, it concluded that none of the applicants warranted a programming preference (Pet. App. 10a). Moreover, in considering the respective applicants' programming it found "merely minor differences in the proportions of time allocated for varying types of programs" (Pet. App. 3a). All intended an affiliation with the ABC network (see Pet. No. 285, p. 4).

v. *WOKO, Inc.*, 329 U.S. 223, 228; *Baltimore & O.R. Co.* v. *United States*, 298 U.S. 349; *Federal Trade Commission* v. *Mary Carter Paint Co.*, 382 U.S. 46, 48. While the court might, independently, have reached a different result, it properly recognized that it is not empowered to choose the grantee but only to assure, as it did, that the Commission properly performed its responsibilities.

2. All of the other applicants were given a substantial preference over the petitioner in No. 285, Federal, with respect to diversification of control of mass communication media; this resulted from Federal's ownership of radio station WSAY, Rochester, and the ownership by its 100-percent stockholder, Gordon P. Brown, of radio station WNIA, Cheektowaga, New York. As the licensee of these standard broadcast stations, Federal was found comparatively inferior to the other applicants with regard to this important factor. In order to improve its comparative standing Federal's counsel, at the second oral argument and some five years after its application was filed, made an oral promise that Federal would dispose of one of its two broadcast interests in the Rochester area. However "solemn," nothing was done to formalize this promise until after the appeal was taken to the court of appeals, following the Commission's grant to Flower City.[8] Such attempts on the part of applicants to improve weaknesses after the close of an administrative record have been consistent-

[8] A "petition to amend the record," was filed by Federal on March 12, 1968, over three months after the Commission's decision denying reconsideration of its earlier decision.

ly disallowed in the exercise of the agency's discretion to control the proceedings before it. *E.g., Guinan* v. *Federal Communications Commission,* 297 F. 2d 782 (C.A.D.C.); *Colorado Radio Corp.* v. *Federal Communications Commission,* 118 F. 2d 24 (C.A.D.C.)

3. Finally, petitioners' assertion that the importance of diversification was unknown until the Commission issued its 1965 *Policy Statement* is unfounded. Diversification of ownership has been a traditional consideration in comparative licensing proceedings and its importance is well established. *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192. See also *Associated Press* v. *United States,* 326 U.S. 1. Indeed, it was specifically considered at the hearing here, and the examiner made findings and conclusions with regard to this factor long before the *Policy Statement* was issued (9 F.C.C. 2d 528).

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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